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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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Petitioners submit this reply to Respondents' brief in order to clarify certain points and to correct misleading statements.

1. Respondents contend that "[a] transfer in the instant case gives effect to the plain meaning of section 302(c)(5) in a manner consistent with ERISA." Brief for the Respondents ("Resp. Brief") at 8. That statement is patently false.

The transfer sought by Respondents does not meet the requirements of Section 4231 of ERISA, 29 U.S.C. § 1411. Brief for the Petitioners ("Pet. Brief") at 29. Further,

Section 408(b)(11) of ERISA, 29 U.S.C. § 1108(b)(11), provides that "a transfer of assets or liabilities between multiemployer plans determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231" shall not constitute a prohibited transaction. The necessary inference is that if a transfer does not meet the requirements of Section 4231 of ERISA, the transfer would violate Title I of ERISA, 29 U.S.C. §§ 1001-1168. *See* Pet. Brief at 28-35 for a fuller discussion of why the transfer sought by Respondents would violate ERISA.

Further, it is beyond any doubt that, under the circumstances of this case, ERISA does *not* require a transfer of assets from the Greater Funds to the Southern Funds. ERISA requires a transfer of assets only where (1) there is also a transfer of liabilities; and (2) there has been a certified change of the employees' bargaining representative. Pet. Brief at 31; Resp. Brief at 31. Neither of those two statutory conditions is satisfied here. If Respondents were correct in their contention that Section 302(c)(5), 29 U.S.C. § 186(c)(5), requires a transfer of assets in the present circumstances, ERISA § 4235, 29 U.S.C. § 1415, and other ERISA provisions would be rendered superfluous. Pet. Brief at 28-35.

2. According to Respondents, the phrase "jointly with" in Section 302(c)(5) "does not permit contributions of one employer to be used only for the benefit of the employees of other employers," Resp. Brief at 11, because "the contributing employer's employees [must] derive benefits from the contributions" in order to avoid a violation of Section 302(c)(5). Resp. Brief at 11, 12-13. Consequently, Respondents argue that the retention of those plan assets by the multiemployer plan from which the employer withdrew constitutes a violation of Section 302(c)(5).

The logic of Respondents' construction of the phrase "jointly with" leads to absurdity and is inconsistent with

other arguments made by Respondents. First, the parenthetical language in Section 302(c)(5) which includes the phrase "jointly with" reflects Congressional recognition and approval of the virtually universal practice of multiemployer plans to "pool" the contributions of all contributing employers—such that all assets of a multiemployer plan are available to pay to any participant the benefits to which he or she may be entitled under the terms of the plan. Respondents' and the Second Circuit's interpretation would attribute to Congress an intention to prohibit the Funds from using money previously contributed by a withdrawing employer, and indistinguishably pooled with other contributions, for the benefit of employees other than the employees of the withdrawing employer.

Multiemployer plans are vehicles for the sharing of risks, i.e., insurance arrangements. There is nothing unfair about some participants receiving less in benefit payouts than the amount contributed on their behalf. The expectation that some participants will not receive payouts is a factor that determines the amount of needed contributions. It is the nature of insurance that some will pay premiums and receive no payout so that others may receive payouts in excess of their premiums. Like other multiemployer plans, Petitioner Funds must pay benefits regardless of the amount of contributions received from the employer or former employer of the recipient of plan benefits. Affidavit of A. H. Higgs, Jr. ("Higgs Affidavit"), Joint Appendix ("J.A.") at 230-232; Affidavit of Dan M. McGill ("McGill Affidavit"), J.A. at 252.

Respondents' and the Second Circuit's reasoning is flawed in that it proves too much. Followed to its logical conclusion, their reasoning would require the benefit plan to disgorge a share of its reserves even when there is no new plan. Multiemployer benefit plans would be prohibited from using contributions of an employer who goes out of business to provide benefits for the employees of the

remaining employers. The attribution of such an intention to Congress is not supported by the legislative history and is contrary to the long-standing practices of multiemployer benefit plans. As noted in *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n. 2 (1st Cir. 1989), "multiemployer pension plans are structured as 'pooled' funds, such that some employers, in effect, 'subsidize' the employees of other employers." *See also* Higgs Affidavit, J.A. at 231; McGill Affidavit, J.A. at 251-52; Brief *Amicus Curiae* of the Western Conference of Teamsters Pension Trust Fund in Support of Petitioners ("Western Conference of Teamsters *Amicus* Brief") at 7, Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans in Support of Petitioners ("NCCMP *Amicus* Brief") at 9, and Brief *Amicus Curiae* of the Central States, Southeast and Southwest Areas Health and Pension Funds in Support of Petitioners ("Central States Teamsters *Amicus* Brief") at 9-11. Moreover, if the touchstone of the alleged violation is that the "surplus reserves" are not used for benefits for the employees on behalf of whom the contributions were made, the Petitioner Funds would be required to transfer plan assets whenever employees leave a plan, whether or not their employer withdraws from the Funds. *Cf.* Brief *Amicus Curiae* of the United States in Support of Petitioners ("United States *Amicus* Brief") at 15-16.

Not only does the reasoning of Respondents fail the test of logic, but also its premise is factually incorrect. The premise is that the so-called surplus reserves are never used for the benefit of the withdrawing employers' employees after an employer withdraws from the multiemployer plan. Even if we assume, for the sake of argument, that Section 302(c)(5) should be construed to require that the employees of a particular contributing employer must "derive benefit from the contributions," they do in fact derive such benefit. During the period that the Respondent employers were contributing to the

Petitioner Funds, their employees enjoyed coverage for health benefits under the Greater Welfare Fund and accrued benefit and vesting credit under the Greater Pension Fund. Western Conference of Teamsters *Amicus* Brief at 13-14. It is not questioned that the Respondent employees received all the benefits to which they were entitled under the terms of the Greater Funds. J.A. at 309, 347, 351, 355, 359, 365. After Respondent employers withdrew from Petitioner Funds, all of their employees who had attained vested benefits in the Greater Pension Fund retained their entitlement to benefits and their former employees who were in pay status continued to receive benefits. As of January 1, 1992, all participants of the Greater Pension Fund who were in pay status, including former employees of Respondent employers, received a 10% increase in their pension payments in recognition of the fact that inflation diminishes the value of fixed pension payments.[1]

3. Respondent employers deny that the transfer of assets they seek from Petitioners is a benefit to them. Resp. Brief at 33. They claim that the transfer is sought to enable their employees to derive benefit from Respondent employers' prior contributions to the Petitioner Funds. Yet, Respondent employers have produced no evidence that the value of the benefits provided to their employees by Petitioners was less than the value of their contributions to the Petitioner Funds. Indeed, nothing in the record negates the possibility that the value of benefits provided by Petitioner Funds to the employees of Respondent employers exceeded the value of the contribu-

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[1] This information is included pursuant to the obligation of counsel to advise the Court of new factual developments which may conceivably affect the outcome in a case before the Court. *Fusari v. Steinberg*, 419 U.S. 379, 390 (1975) (Chief Justice Burger, concurring). This increase in pension benefits can be verified by the official records of the Greater Pension Fund and will be reflected in its next annual report which, like other such reports, are available to the public at the U.S. Department of Labor.

tions made by the Respondent employers to the Petitioner Funds.

Respondent employers' denial that they would be the beneficiaries of the transfer rings hollow. The District Court specifically found that the transfer at issue here would be for the benefit of the Respondent employers. Appendix to the Petition for a Writ of Certiorari ("Cert. App.") at 20a-21a. The position of the Internal Revenue Service ("IRS") is that a transfer of assets like the one sought here would constitute taxable income to the Respondent employers. IRS Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989). *See also* IRS Priv. Ltr. Rul. 91-36-017 (June 10, 1991). Respondent employers conceded that their purpose in bringing this action was to diminish their obligation to contribute to the new Southern Funds. J.A. at 332-33, 341-42. In this connection it is noteworthy that Respondent employers themselves, and not the new Southern Funds, brought the present action, and those Funds are not parties in this litigation.

4. The Second Circuit and Respondents contend that their position is consistent with Title IV of ERISA, 29 U.S.C. §§ 1301-1461. Cert. App at 6a; Resp. Brief at 28-31. Respondents conveniently neglect to mention a fundamental and critical difference between their reading of Section 302(c)(5) and the provisions of Title IV of ERISA regarding transfers of assets. In situations where Respondents would interpret Section 302(c)(5) to *require* a transfer, Title IV would either *prohibit* the transfer or would make the transfer *discretionary* in the judgment of the transferor plan.[2] Pet. Brief at 28-36. Title IV prohibits a transfer of assets without a corresponding transfer of liabilities. Pet. Brief at 29-31. Furthermore, Section 4231 in Title IV of ERISA prohibits any transfer from one multiemployer plan to another in the absence of specified criteria, which have not been met in this case. *Id.* With the exception noted

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[2] The only exception is where there has been a certified change of collecitve bargaining representative. *See* Pet. Brief at 31.

in footnote 2, *supra*, Title IV "leaves the possibility of a transfer of liabilities, with a concomitant transfer of assets, to the discretion of the trustees [of the transferor plan]." *Vornado, Inc. v. Trustees of Retail Store Employees Union Local 1262*, 829 F.2d 416, 421 (3d Cir. 1987); United States *Amicus* Brief at 19.

5. Respondents assert repeatedly that the employees of the Respondent employers "transferred" from the Greater Funds to the Southern Funds. To the extent that "transfer" suggests that Respondent employees made a choice of their free will, no such "transfer" from the Greater Funds to the Southern Funds occurred. Respondent employers withdrew from the Greater Funds by ceasing to make contributions, thereby causing a cessation of benefit accruals under the Greater Pension Fund and ineligibility for benefits under the Greater Welfare Fund for those employees. Indeed, Respondent employees, through their collective bargaining representative, actively resisted the withdrawals. Pet. Brief at 3. Moreover, the new Southern Funds were not established until *after* the commencement of this lawsuit, Pet. Brief at 4; Resp. Brief at 5, which indicates that Respondents did not consider their employees' "transfer" to the Southern Fund a necessary element of their cause of action. Further mitigating against the common understanding of "transfer" is the fact that there was a 17-month interval between the withdrawal of Respondent employers from the Greater Pension Fund and the effective date of the Southern Pension Funds. Pet. Brief at 4 n.1.

6. Respondents repeatedly (i.e., 60 times) assert that this case involves "surplus" or "excess" reserves of the Greater Funds. That is simply not true.

"Surplus" or "excess" reserves or assets have not been the subject of the present case in either the Court of Appals or the District Court. Indeed, if "surplus" reserves were the touchstone on which Respondents' claim is based, it would have been a necessary allegation in their com-

plaint; it would have been a necessary element of their evidence; and it would have been the subject of necessary findings by the courts below. However, none of the foregoing occurred here. The Respondents did not allege a claim in their complaint in terms of "surplus" or "excess" reserves, and they did not present any evidence regarding the existence of such "surplus" or "excess" reserves. Consequently, neither of the courts below made any findings, or rendered their decisions, with reference to any "surplus." In fact, the term "surplus" does not even appear in the opinions of either of those courts. Finally, this Court did not grant review of an issue involving "surplus" or "excess" reserves. In any event, Section 302(c)(5) neither requires a transfer of assets with reference to all plan reserves nor does it require such a transfer with reference to "surplus" reserves.

7. Respondents claim that they "seek only the Southern Employees' proportionate share of the surplus reserves in the Greater Funds." Resp. Brief at 9 n.5. In addition to this claim falling outside the scope of the questions that this Court agreed to review, Respondents' new claim is wholly inconsistent with Respondents' position below. Respondents previously argued that:

> [I]n order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are attributable, in corresponding amounts, to the *contributions made by each contributing employer*. Further, *the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer* . . . . Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made.

Response (to Interrogatory No. 6) of Respondents/Plaintiffs to Petitioners'/Defendants' First Set of Interrogatories (emphasis added). J. A. at 305. Respondents made

the same assertion regarding the Greater Welfare Fund. J.A. at 306-07.

Under the Respondents' prior position, they claimed entitlement to a proportionate share of all of the reserves of the Petitioners Funds. In contrast, their new position would entitle Respondents to a share of the "surplus" assets of the Funds. The shifting of Respondents' position underlines the weakness of their prior position and their inability to defend the holding of the Court of Appeals.

8. The Second Circuit and Respondents assert that their position does not require a benefit plan to segregate the contributions of each contributing employer. Cert. App. at 10a; Resp. Brief at 12. Yet, the claim is made that the Greater Funds "must recognize . . . the contributions made by each contributing employer" and "must utilize those assets solely to benefit the employees of each particular contributing employer . . . ." J.A. at 305, 307. Even if the contributions of each contributing employer were not segregated, the holding of the Court of Appeals would require sufficient records to reconstruct the amount of contributions of an employer compared with the value of benefits provided to the employees of that employer. To impose such a system on multiemployer benefit plans would be their deathknell. The burden of keeping the necessary records alone would make many multiemployer benefit plans uneconomic. Uncontradicted expert testimony in the record is that:

> Many multiemployer plans include hundreds, even thousands of employers, and often employees obtain credits under the plan while working for a number of different employers. Individual accounting would be so inordinately expensive that, as a practical matter, many multiemployer plans could not exist if they were forced to undertake it.

McGill Affidavit, J.A. at 252. Because the gathering of such information is impractical, even the largest multi-

employer plans do not collect it. *See* Western Conference of Teamsters *Amicus* Brief at 21, 22 n.11. *See also Frank L. Ciminelli Construction Co. v. Buffalo Laborers Supplemental Unemployment Benefit Fund*, No. 92-7163, 1992 WL 251413, at *2 (2d Cir. Oct. 5, 1992).

The Second Circuit held:

> the only way that the Southern Employees could ever receive the "sole and exclusive benefit" of their employers' contributions to the Greater Funds on their behalf would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds.

Cert. App. at 11a.

Respondents argue that under that mandate, the Greater Funds should pay the Southern Funds "the average ratio of the Southern Employers' contributions to the total contributions to the [Greater Funds] as a percentage of the increase in the [Greater Funds'] surplus reserves during the time the Southern Employers contributed to the [Greater Funds]." Resp. Brief at 25-26. Apart from the fact that (1) Section 302(c)(5) does not require any payment, and (2) ERISA would bar any payment under the facts of this case, there are practical and logical difficulties with the position of Respondents and the Second Circuit.

First, the proposed rule would require the existence of records going back decades regarding (1) the amount of contributions made to a multiemployer benefit plan by each contributing employer, and (2) the amount of so-called "surplus reserves" the plan had over that entire period. Section 107 of ERISA, 29 U.S.C. § 1027, requires that plan records must be kept for only six years.

Second, Respondents' proposed rule would require an understanding of what "surplus reserves" means. That phrase is not a term of art used in ERISA or the Internal Revenue Code ("Code").[3] Nevertheless, Respondents offer

[3] The term "residual assets" is used in ERISA Section 4044(d), 29 U.S.C. § 1344, to refer to assets left over after payment of all

the following definition: "The amount of the trust fund's pooled assets in excess of its pooled liabilities are surplus reserves." Resp. Brief at 13. It is not at all clear how that definition of "surplus reserves" would be applied to an ongoing benefit plan. A plan's assets may increase to an amount exceeding liabilities without any new contributions causing it; for example, a plan's assets or reserves may increase or decrease as the stock market rises or falls. If the plan's fiduciaries decide that the plan should have a reasonable cushion over current liabilities in order to protect against the vagaries of the market, would the plan fiduciaries be putting the amount of the cushion at risk as "surplus reserves?" A welfare plan is typically funded on a pay-as-you-go basis. If a welfare plan has a reserve to cover any higher than projected costs, would that reserve be the "surplus reserves" of a plan? The valuation of liabilities for purposes of applying the Second Circuit's or the Respondents' formula is even more difficult. Changes in interest rates, whether one or more employees later become employed by a contributing employer and other variables can make large differences in the calculations of liabilities of plans.[4]

It is highly pertinent that Congress in enacting the existing system of withdrawal liability was not able to devise a practical system which compares a withdrawing employer's actual contributions to the actual liabilities left behind. Instead, Congress enacted as the presumptive method of calculating withdrawal liability, a formula which is intended to result in rough justice for the multiemployer plan over a period of time, even though particular employers may be required to pay amounts that may vary grossly from what a particularized com-

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plan liabilities upon termination of a single-employer pension plan. *See also* Code § 4980, 26 U.S.C. § 4980; ERISA § 404(d), 29 U.S.C. § 1104(d). The term "excess pension asset" was introduced in 1990 solely in connection with the transfer of pension assets to pay retiree health benefits. Code § 420, 26 U.S.C. § 420; ERISA §§ 101(d) and 408(b)(13), 29 U.S.C. §§ 1021(d), 1108(b)(13).

[4] *See* Western Conference of Teamsters *Amici* Brief at 20-24.

putation balancing actual contributions with benefits might yield.[5] ERISA § 4211(b), 29 U.S.C. § 1391(b). It would be equally difficult to measure the "allocation" ordered by the Court below; the development of any such complex program is clearly a legislative function, not one for the courts.

9. The Respondents' brief includes statements which are prejudicial and improper. Respondents' brief alleges wrongdoing in the administration of the Greater Funds. Resp. Brief at 4. Although these allegations were made in Respondents' original complaint, they were dropped from the subsequently amended, operative complaint. Had these allegations not been dropped from the Respondents' complaint, they would have been denied and appropriate evidence would have been presented. However, the allegations were not in issue, no evidence was presented, and no findings were made by the courts below. In these circumstances, for the Respondents to make these allegations in this Court as if they were facts is scandalous, and the statements should be stricken and disregarded.[6]

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[5] *See* NCCMP *Amicus* Brief at 11-14.

[6] Respondents complain that Petitioners' Statement of the Facts goes beyond the record (Resp. Brief at 4 n.3) in stating that "Like other health benefit plans, the Greater Welfare Fund has been struggling to maintain health benefit levels in the face of ever-rising costs. The Greater Pension Fund provides a modest maximum pension of $350 per month." It is respectfully submitted that the struggle of health benefit plans to maintain benefit levels in the face of ever-rising costs is so well known and notorious that judicial notice may be taken of the phenomenon. *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 (1934). Further, the impact of this phenomenon on the Greater Welfare Fund is reflected in annual reports available to the public in the Public Document Room, U.S. Department of Labor. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977). As to the statement that the Greater Pension Fund "provides a modest maximum pension," Resp. Brief at 4 n.3, the record shows a maximum pension of $350 per month (J.A. at 205) and it is respectfully submitted that it is reasonable to characterize such a pension as "modest." It is noted that an income at that level is below the poverty line. *Poverty in the United States*, U.S. Department of Commerce, Bureau of the Census (1991).

CONCLUSION

The best evidence of the error in the Second Circuit's interpretation of Section 302(c)(5) is the language of the statute itself. The words of the statute say nothing about transfers of assets from one multiemployer plan to another. *A fortiori*, the statute provides no basis for prescribing the particular circumstances wherein such a transfer is required to be made. Respondents argue that this Court should itself prescribe the conditions under which such a transfer of assets should be required. However, prescription of the law relating to the use of plan assets is a function for Congress. Congress did not address that subject in Section 302(c)(5), but did so in detail in ERISA.[7]

The decision below of the Second Circuit puts the continued existence of multiemployer benefit plans in jeopardy. The National Coordinating Committee for Multiemployer Plans, representing over 190 multiemployer plans, and three of the largest multiemployer plans in the United States, the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds and the Western Conference of Teamsters Pension Trust Fund provide attestation to that concern. Western Conference of Teamsters *Amicus* Brief, NCCMP *Amicus* Brief and Central States Teamsters *Amicus* Brief. That the Second Circuit has misconstrued Section 302 of the LMRA, a criminal statute, has been demonstrated and attested to by the United States, on behalf of the De-

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[7] In *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 375 (1990), this Court was faced with the question whether a general provision in the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(c), may override ERISA's prohibition on the alienation of pension benefits. This Court held that ERISA prevailed (at least in part) on the basis of the "elementary tenet of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . .'" (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

partment of Labor and the Pension Benefit Guaranty Corporation, *see* United States *Amicus* Brief, as well as by the amici named above.

Moreover, the Second Circuit's holding that Section 302 mandates "a reallocation" of the assets of Petitioner Funds is inconsistent with this Court's conclusion in *United Mine Workers v. Robinson*, 455 U.S. 562, 572 (1982), that Section 302 does not place "any restriction on the allocation of the funds among the persons protected." For all of the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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